

12/94

N.A.S.D. AWARD

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NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Boyd H. Anderson, Jr. as Successor TTEE
and Lawrence Larche, Executor, Frederick
A. Heitman Estate

Case No. 92-03466 and 92-04030
Consolidated

Name of Respondents

* Dean Witter Reynolds, Inc.
Smith Barney Harris Upham & Co., Inc.
Earl Miller

REPRESENTATION

For Claimants, Boyd H. Anderson, Jr. as Successor TTEE, Bertha Heitman Marital Trust ("Anderson") and Lawrence Larche, Executor, Frederick A. Heitman Estate ("Larche"): Mark F. Raymond, Esq. of Tew & Garcia-Pedrosa, Miami, Florida.

For Respondents, Dean Witter Reynolds, Inc. ("DWR") and Earl Miller ("Miller"): Glen D. Kelley, Esq. of Kelley, Aldrich & Warren, P.A., West Palm Beach, Florida.

For Respondent, Smith Barney Harris Upham & Co. Inc. ("SBHU"): Susan E. Harkins, Esq. of SBHU, New York, NY.

CASE INFORMATION

Statement of Claim filed: October 13, 1992 by Anderson and December 1, 1992 by Larche. These matters were consolidated on June 3, 1993. Claimants' Submission Agreements signed: September 28, 1992 by Anderson and January 14, 1993 by Larche.

Respondents, DWR and Miller's, Joint Statement of Answer filed December 11, 1992 in Anderson and March 19, 1993 in Larche. Respondents, SBHU and Miller's, Joint Statement of Answer filed December 21, 1992 in Anderson and March 22, 1993 in Larche. Respondents' Submission Agreements signed: February 18, 1994 by Edward W. Larkin, Esq. on behalf of DWR for both the Anderson and Larche matters; by Miller on December 14, 1992 in Anderson and on March 29, 1993 in Larche; by Susan E. Harkins on behalf of SBHU on January 8, 1993 in Anderson and on March 24, 1993 in Larche.

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HEARING INFORMATION

On August 2, 1993, in Fort Lauderdale, Florida, one pre-hearing Conference lasting one session was conducted, via telephone conference call, with one arbitrator. On January 14, 1994, a second pre-hearing Conference lasting one session was conducted, via telephone conference call, with three arbitrators presiding.

On February 16, 17, and 18; June 13, 14, 15, 16, and 17; and October 17 and 18, 1994, in Fort Lauderdale, Florida, hearings lasting 25 sessions were conducted.

CASE SUMMARY

Claimants, Anderson and Larche alleged that during the relevant time period Fred Heitman was over 95 years old with impaired vision; that Respondents DWR, SBHU, and Miller controlled the Trust account and the Fred Heitman account and were liable for: breach of fiduciary duty, violation of State and Federal Securities laws, including Chapter 517, Florida Statutes, churning, negligent supervision, negligence, breach of contract, and fraud; and that, specifically, Respondents' liability resulted from failure to adequately train and supervise Miller, failure to have a proper compliance and supervision program, failure to protect the interests of the Trust and its beneficiaries and Fred Heitman by allowing unsuitable investments, willfully misrepresenting the suitability of those investments, and conducting excessive trading for the sole purpose of unjustly enriching themselves.

Respondents, DWR, SBHU, and Miller denied all allegations of wrongdoing. (Prior to hearing Claimants settled all claims against SBHU and Miller on the claims asserted relating to transactions at SBHU. See "Other Issues".)

DWR and Miller alleged that each of the investments made in the Bertha Heitman Marital Trust (the "Trust") account and in the individual account of Frederick Heitman were suitable; that each investment was authorized in advance by Frederick Heitman and each investment met the objectives of the Trust and Frederick, and always fully discussed each investment with Dr. Heitman; that Frederick Heitman was a knowledgeable investor who closely traced his investments at DWR and at other brokerage firms, and Dr. Heitman was in complete control of both his own accounts and the Trust account; that the Trust account was well-balanced and met the needs of both the income beneficiary, Frederick Heitman, and the future needs of the remaindermen; that the Trust account realized an out-of-pocket gain during the three years the Trust account was at DWR, producing 9.5% income to Frederick Heitman with commissions of only 2% annually; that during his lifetime, Dr. Heitman never complained about the handling of his accounts by Miller, nor has any other beneficiary under the Trust ever complained about the handling of the Trust; and, that Respondents believed this to be a totally frivolous action brought by parties seeking to be unjustly enriched through the bringing of meritless legal proceedings paid for by the Trust.

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RELIEF REQUESTED

Claimants requested damages in excess of \$250,000, punitive damages, costs and attorneys' fees.

Respondents, DWR and Miller, requested an award be entered in their favor finding that they are not liable to the Claimants; that the costs of the arbitration be borne by the Claimants and that the arbitrators make a specific finding that the Respondents are entitled to their attorneys' fees in connection with the defense of this matter, with the amount of the fees to be determined by a court of competent jurisdiction.

OTHER ISSUES CONSIDERED AND DECIDED

1. The Claimants requested sanctions, alleging that Respondent, DWR, failed to comply with the Panel's Orders compelling production. Claimants sought attorney's fees, costs, and punitive damages,

a. With respect to the attorney's fees and costs portion of that motion, it was resolved by stipulation between the parties that DWR would pay that day, October 18, 1994, by check, the aggregate amount of \$6,500.00 to Claimants' counsel. That amount was to represent the actual attorney's fees and expenses incurred in connection with obtaining compliance with the arbitrators' orders regarding the production of documents to the Claimants.

b. With respect to the punitive damages portion of that motion, the arbitrators find that, pursuant to the guidelines in the Arbitrator's Manual (May 1992), "Arbitrator's Power to issue Orders", page 15, they have wide discretion in addressing non-compliance with their orders and that Section 35 of the Code provides that:

the arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrators. Such interpretations and actions to obtain compliance shall be final and binding upon the parties. [Amended November 16, 1992.]

Therefore, it is ordered that, in addition to the stipulated sum of \$6,500.00, DWR shall pay the further sum of an additional \$6,500.00, which shall be paid to the National Association of Securities Dealers, Inc., in administrative costs, as sanctions for DWR's acts of bad faith and repeated, willful and flagrant violation of the orders of this Panel.

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2. The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award be entered. In either case, the parties have agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, and post-hearing submissions, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, DWR and Miller, are found liable, jointly and severally, in the Anderson matter, Case No. 92-03466, and shall pay to the Claimants the amount of \$48,000.00 for the Bertha Heitman marital trust.
2. Respondents, DWR and Miller, are found liable, jointly and severally, in the Larche matter, Case No. 92-04030, and shall pay to the Claimants the amount of \$24,000.00 for the Estate of Fred Heitman.
3. Claimants' request for punitive damages is denied, but see "Other Issues" and "Other Costs".
4. With respect to Claimants' request for attorney's fees, this Panel makes no finding as to entitlement and refers the parties to a court of competent jurisdiction for a determination thereof.
5. Claimants' request for pre-judgment interest is denied.
6. Respondents' requests for attorney's fees and costs are denied.

OTHER COSTS

Based upon the findings of the Panel in Paragraph 1 in "Other Issues", DWR shall pay \$6,500.00 to the National Association of Securities Dealers, Inc., in administrative costs, as stated above,

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$26,300.00 (one pre-hearing conference x \$300.00, one pre-hearing conference with three arbitrators x \$1,000.00, plus 25 sessions x \$1,000.00).
2. Respondent, DWR is hereby assessed \$26,300.00, for which the NASD shall retain the \$13,250.00 previously paid as additional session deposits; and of the remaining \$13,050.00 due, \$12,400.00 shall be paid directly to the Claimants in reimbursement for the session deposits made in these consolidated cases, and \$650.00 shall be paid to the National Association of Securities Dealers, Inc.

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3. The NASD shall retain the non-refundable filing fees paid by the Claimants: \$750.00 in Anderson and \$250.00 in Larche.

4. The NASD shall also retain the session deposits paid by the Claimants: \$11,400.00 in Anderson and \$1,000.00 in Larche, for which Claimants shall be reimbursed by DWR as specified above.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators Signatures:

/s/
Arthur J. Leibell, Esq

Public, Chairperson

/s/
Stanley Bo Fineberg

Public

/s/
Donald R. McGahan

Industry

Date of Decision: December 27, 1994